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THE RIGHT TO A LAWYER: THE IMPLICATIONS OF GIDEON V. WAINWRIGHT

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Shortly before dawn on June 3, 1961, a police officer making his rounds in Panama City, Florida, found the front door of the Bay Harbor Poolroom ajar. He investigated and discovered that a window at the rear of the building had been shattered; a cigarette machine and jukebox had apparently been rifled.[1] A bystander informed the policeman that he had glanced through the store window a short time before and had seen an acquaintance in the poolroom. He identified the man as Clarence Earl Gideon.[2] On the basis of this information, Gideon was arrested. He was subsequently indicted for "breaking and entering with intent to commit a misdemeanor," a felony under Florida law.

At the commencement of his trial, Gideon, who was indigent, rose and asked the court "to appoint counsel to represent me in this trial. . . . The United States Supreme Court says I am entitled to be represented by counsel."[3] His application was denied by the trial judge on the grounds that "under the laws of the State of Florida, the only time the court can appoint counsel to represent a defendant is when that person is charged with a capital offense."[4] A jury was then impaneled, and the case proceeded to trial. Gideon represented himself. He examined several witnesses called in his behalf; he cross-examined the state's witnesses; and he made a closing argument. He was found guilty by the jury, and he was sentenced to five years' imprisonment, the maximum penalty under the applicable statute.

This episode — a commonplace in some state courts prior to March, 1963 — was the genesis of an historic decision by the Supreme Court respecting the right of an accused person to the assistance of counsel.

Gideon was imprisoned in the Florida state penitentiary at Raiford. Without the assistance of counsel, he prepared a petition for habeas corpus which he filed with the Florida Supreme Court. He claimed that refusal by the trial court to appoint a lawyer to represent him violated his constitutional rights. This petition was denied by the Florida Supreme Court without opinion.[5]

Gideon then personally sent a handwritten petition for certiorari and a motion for leave to proceed in forma pauperis to the United States Supreme

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This article is based upon a paper delivered on October 23, 1963, at the National Legal Aid and Defender Association Conference in Miami Beach, Florida.

I should state that my colleague, Abe Fortas, was appointed by the United States Supreme Court to represent Clarence Earl Gideon, and that I assisted him in preparation of the brief in Gideon v. Wainwright. I bear sole responsibility for the views expressed in this article.

1 Transcript of Record, pp. 23-24, Gideon v. Wainwright, 372 U.S. 335 (1963).

2 *Id.* at 17.

3 *Id.* at 9.

4 *Ibid.*

5 Gideon v. Cochran, 135 So. 2d 746 (Fla. 1961). H. G. Cochran, Jr., who was Director of the Florida Division of Corrections during proceedings in the lower court and at the time certiorari was granted, was succeeded by Louis L. Wainwright, prior to the United States Supreme Court's decision and the style of the case was accordingly changed.

Court. Hundreds of such petitions by prisoners pour into the Court[6]; few are granted. Gideon's petition, however, was plucked out of this maelstrom, and, on June 4, 1962, the Supreme Court granted certiorari and appointed counsel to represent Gideon. In its order granting the petition, the Court took the unusual step of formulating the precise issue it wished to hear: "In addition to other questions presented by this case, counsel are requested to discuss the following in their briefs and oral argument: 'Should this Court's holding in *Betts v. Brady,* 316 U.S. 455, be reconsidered?' "[7]

In *Betts,* decided in 1942, the Court ruled, in a case closely analogous to Gideon's, that the Fourteenth Amendment requires the states to appoint counsel for an indigent criminal defendant only where there are special circumstances, that is only where proceeding without a lawyer would be "offensive to the common and fundamental ideas of fairness."[8] From the day it was announced, the special circumstances test was forcefully and repeatedly criticized, both by individual justices and by commentators,[9] but it was the applicable standard when Gideon was tried.

Two months after the oral argument in Gideon's case, on March 18, 1963, a unanimous Supreme Court held, "upon full reconsideration," that *Betts v. Brady* should be overruled.[10] Mr. Justice Black — the author of the dissenting opinion in *Betts* — delivered the opinion for the Court in *Gideon.* The assistance of counsel, he wrote, is "fundamental and essential to a fair trial." The Court, he said flatly, "was wrong" when it concluded in *Betts* "that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights" covered by the due process clause of the Fourteenth Amendment.[11] The special circumstances test was jettisoned. Gideon's conviction was set aside as having been rendered in violation of the Fourteenth Amendment.[12]

Justice Clark concurred separately.[13] He felt that a valid distinction could not be drawn, as a matter of constitutional law, between capital and noncapital cases. It followed, in his view, that since the states were required to furnish counsel in a case where a death sentence could be imposed, they were required to do so in all cases. Justice Harlan, also concurring separately,[14] pointed out that the special circumstances rule had been "substantially and steadily eroded" by Supreme Court decisions subsequent to *Betts,* and it was "no longer a reality." He felt that "To continue a rule which is honored by

6 During the October, 1961, term, when Gideon's petition was granted, 1282 matters were listed on the Supreme Court's Miscellaneous Docket; the great bulk of these are petitions filed *pro se* by prisoners, similar to Gideon's handwritten petition. See *The Supreme Court, 1961 Term,* 76 HARV. L. REV. 78, 82 (1962).

7 Gideon v. Cochran, 370 U.S. 908 (1962).

8 Betts v. Brady, 316 U.S. 455, 473 (1942).

9 See, e.g., Cohen and Griswold, N. Y. Times, Aug. 2, 1942, § IV, p. 6, col. 5, quoted in Bute v. Illinois, 333 U.S. 640, 677, n. 1 (1948) (Douglas, J. dissenting); Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice,* 8 DEPAUL L. REV. 213, 230 (1958); Kamisar, *The Right to Counsel and Fourteenth Amendment: A Dialogue on 'The Most Pervasive Right' of an Accused,* 30 U. CHI. L. REV. 1 (1962).

10 Gideon v. Wainwright, 372 U.S. 335 (1963).

11 *Id.* at 342.

12 Upon retrial, when he was represented by counsel, Gideon was acquitted. N.Y. Times, Aug. 7, 1963, p. 56, col. 1.

13 372 U.S. at 347.

14 *Id.* at 349.

this court only with lip service is not a healthy thing and in the long run will do disservice to the federal system."[15] Justice Douglas filed a concurring opinion indicating his view that all of the Bill of Rights are enforceable against the states under the Fourteenth Amendment.[16]

I

In considering the implications of the *Gideon* decision, it is helpful to ask this preliminary question: Why did the Supreme Court decide the basic issue presented by *Gideon* when it did — on March 18, 1963? The issue of the absolute right to counsel in state criminal prosecutions had been involved in numerous cases which came to the Court in the late forties and in the 1950's, but the Court did not overrule *Betts*. It is true that the record in *Gideon* presented the question with great clarity. But the Court could have bypassed the ultimate issue presented; it has a large measure of control over its docket and over the manner in which it decides a case.

There are some who yield to the temptation to answer this question simply in terms of changes during the past several years in the membership of the Court. They point, for example, to the retirement of Justice Frankfurter, who suffered a stroke in April, 1962, while Gideon's handwritten petition for certiorari was pending before the Court.[17] At that time Justice Frankfurter was the only justice still sitting who had joined the majority in *Betts v. Brady*. He had been a staunch champion of the "special circumstances" test,[18] and he had been a leading foe of the doctrine that all of the Bill of Rights are made applicable to the states by the Fourteenth Amendment.[19]

An obvious flaw with the foregoing rationale is that the *Gideon* decision was unanimous; several of the justices who frequently share Justice Frankfurter's views of *stare decisis* and the proper role of the Supreme Court with respect to state criminal procedure, voted in *Gideon* to overrule *Betts v. Brady*. Further, there is no certainty by any means that Justice Frankfurter himself would not, upon reconsideration, have joined in the result in *Gideon,* though quite possibly on grounds different from those delineated for the Court by Justice Black.

There are other factors which may account for the outcome in *Gideon* more satisfactorily.

First, I believe that the Court had become convinced, by its own experience, that the existing rule governing the assignment of counsel in state criminal prosecutions — the "special circumstances" test of *Betts v. Brady* — was simply not a workable standard. The Court had made a valiant effort for two decades to give content to the rule. But each decision led to new qualifications. The list of "special circumstances" grew longer with each opinion,[20] and there

15 *Id.* at 350-51.
16 *Id.* at 345.
17 Justice Frankfurter did not participate in any phase of the *Gideon* case. He retired in August, 1962, prior to the oral argument and decision. See 83 Sup. Ct. XVIII (1962).
18 *E.g.,* Foster v. Illinois, 332 U.S. 134 (1947).
19 *E.g.,* Adamson v. California, 332 U.S. 46, 59 (1947) (concurring opinion).
20 Among the many factors held relevant, for example, in deciding whether the proceeding was fundamentally unfair were the complexity of the statute under which the defendant was prosecuted and the nature of the offense charged, McNeal v. Culver, 365 U.S. 109 (1961); illiteracy, Carnley v. Cochran, 369 U.S. 506 (1962); mental illness or mental

seemed to be no end in sight to the flood of cases pouring in upon the Court which raised this problem. In short, the "special circumstances" test was too ambiguous; too subjective; too difficult to administer.

Second, "time ha[d] set its face," in Justice Clark's phrase,[21] against the principal argument advanced by those who opposed requiring the states to appoint counsel in every criminal case. It had been urged that such a rule would be inconsistent with the demands of federalism, that is, with the power of the states to prescribe their local court procedures.[22] But at the time of the *Gideon* decision, thirty-seven states expressly provided, in one form or another, for the appointment of counsel in all felony cases.[23] It was the general practice in eight other states to furnish such assistance if requested.[24] As of March, 1963, therefore, there were only five laggard states which did not make provision for appointment of counsel in all felony cases — Florida, Alabama, Mississippi, and the two Carolinas. In brief, the argument that the Court would intrude upon states' rights was sapped of vitality by the actual situation in the states.

Twenty-two states joined in filing an Amicus brief in the *Gideon* case asking the Supreme Court to overrule *Betts v. Brady*.[25] I know of no parallel for this extraordinary action — a request by nearly half the states that the Supreme Court impose a constitutional requirement upon the states in the field of criminal justice. I believe the Court was impressed by the broad consensus of opinion which had emerged in the states concerning the necessity for the appointment of counsel in behalf of indigent defendants in criminal cases.

Indeed, experience had demonstrated that the *Betts* rule, far from advancing the interests of federalism, generated friction between state and federal courts. Federal judges were continually asked to review state criminal convictions entered in the absence of counsel in light of a vague and subjective standard. Little wonder that the federal habeas corpus jurisdiction in cases involving the right to counsel provoked the resentment of state judges!

Finally, and most fundamentally, the Court had become convinced that a fair system of justice requires that every man have the assistance of a trained spokesman, whether the trial occurs in a federal or state courthouse. As Justice Black put it: "Reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[26] The *Gideon* decision cannot be regarded as an isolated phenomenon. It is part and parcel of the whole corpus of constitutional law relating to state criminal procedure created by the Supreme Court during the past quarter of a century. *Gideon* belongs in the company of the long list of Supreme Court decisions in

retardation, Massey v. Moore, 348 U.S. 105 (1954); youth of the accused, Uveges v. Pennsylvania, 335 U.S. 437 (1948); the extent of the accused's prior experience with criminal proceedings, Wade v. Mayo, 334 U.S. 672 (1948); misconduct by the trial judge or prosecutor, Townsend v. Burke, 334 U.S. 736 (1948). The foregoing list is by no means exhaustive.

21 Mapp v. Ohio, 367 U.S. 643, 653 (1961).

22 Bute v. Illinois, 333 U.S. 640, 668 (1948).

23 Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on 'The Most Pervasive Right' of an Accused*, 30 U. CHI. L. REV. 1, 17 (1962).

24 *Id.* at 18-19.

25 Brief for the State Government Amici Curiae, Gideon v. Wainwright, 372 U.S. 335 (1963).

26 372 U.S. at 344.

recent years dealing with unreasonable searches and seizures, coerced confessions, double jeopardy, illegal arrests, and cruel and unusual punishment. It became firmly established in these cases that it was proper and appropriate for the Supreme Court to prescribe standards of fair procedure for state criminal prosecutions[27]; the *Gideon* decision builds upon this premise. The decision reflects the present Supreme Court's deep and abiding concern with the problems of individual rights and civil liberties. Viewed from an historical perspective, *Gideon* is a by-product of the cold war — it stands as a notice that in the free world no man shall be condemned to penal servitude without a lawyer to defend him.

II

I should like to turn next to the implications of the decision with respect to the specific right involved: the right to counsel in state criminal cases.

The precise point of law decided in *Gideon* is that the Fourteenth Amendment requires the states to furnish counsel to an indigent accused person at a trial for a serious criminal offense where such aid is requested. But an opinion by a unanimous court with respect to a fundamental constitutional right should not, and cannot, be read literally and narrowly like a corporate trust indenture. I believe it was the intent of the Court that its opinion should be construed liberally and that the right should be granted generously.

First, there is an immediate, pressing issue as to whether the *Gideon* rule applies restrospectively to a conviction which occurred before the Supreme Court's decision in March, 1963.[28] It has been reported that in Florida, for example, of the 8,000 prisoners in the state's penal institutions, 4,542 were convicted without a lawyer, and by October, 1963, more than 3,000 of these prisoners had filed petitions seeking review of their convictions on the authority of *Gideon*.[29]

Shortly after the opening of the October, 1963, term, the Supreme Court remanded ten right-to-counsel cases to the Florida Supreme Court for reconsideration by that court in light of the *Gideon* decision.[30] The cases all involved convictions of unrepresented defendants which had occurred before *Gideon* was decided by the Supreme Court. Justice Harlan dissented from the Court's action. He felt that the entire question of the retroactive effect of a decision changing an established rule of state criminal procedure should not be settled by the Supreme Court without full-scale argument.

The point involved is one of those fascinating issues touching one's conception of the nature of law upon which lawyers delight to dwell; it invites a short comment.

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27 See Allen. *The Supreme Court, Federalism, and State Systems of Criminal Justice,* 8 DEPAUL L. REV. 213 (1958).

28 In the first state court decision reported subsequent to *Gideon,* the Pennsylvania Supreme Court said that a "reading of Gideon indicates that its application is *prospective* rather than *retroactive* . . ." (Emphasis in original). The Court held *Gideon* inapplicable to a defendant who pleaded guilty without counsel in 1931. Commonwealth *ex rel.* Craig v. Banmiller, 410 Pa. 584, 189 A.2d 875 (1963). The Court of Appeals for the Fourth Circuit found it unnecessary to pass on the retroactivity issue in Jones v. Cunningham, 319 F.2d 1 (4th Cir. 1963). The Michigan Supreme Court has held the Gideon rule applies retroactively. In re Palmer, 32 U.S.L. WEEK 2272 (Mich., Dec. 10, 1963).

29 Time Magazine, Oct. 18, 1963, p. 53.

30 Pickelsimer v. Wainwright, 84 Sup. Ct. 80 (1963).

From time to time, it has been suggested that a decision changing a constitutional principle should apply only to future cases, except that the new rule would govern the actual case decided. Justice Frankfurter and Justice Cardozo, among others, have urged that it may be appropriate in some cases, for practical reasons, to give only prospective effect to a ruling which changes the law.[31] Proponents of this view assert in substance that the overruled case was deemed sound when it was decided; that it has been overturned because circumstances have changed; and that it is nonsense to indulge in the fiction that the superseded case was never "the law."

It has generally been assumed, however, that a decision which overrules a point of federal constitutional law will be given retrospective effect. The ruling that the Sixth Amendment requires appointment of counsel in all federal criminal prosecutions was applied retroactively,[32] and in 1958 the Supreme Court held that the principle of *Griffin v. Illinois*,[33] decided in 1956, was applicable to a 1935 conviction.[34] It must be noted, though, that the retroactivity issue was resolved in these cases without detailed discussion.

The basic question as to which there is disagreement is whether the *Gideon* rule should apply to individuals convicted before Gideon's trial in 1961 who did not have any petition pending in any court in March, 1963, when the Supreme Court issued its opinion. Those who favor limiting the retroactive impact of the *Gideon* decision, because of the practical consequences, probably would agree that the new rule should apply to all cases involving the same issue which were pending on the Supreme Court's docket in March, 1963. Obviously, basic rights should not turn on the fortuitous circumstances of the Court's docket, i.e., on the happenstance that one case rather than another is reached first for oral argument and decision. It might also be conceded that the *Gideon* rule should apply to all cases raising the right to counsel point which were awaiting disposition in any state court or in any of the lower federal courts when *Gideon* was decided by the Supreme Court, whatever the date of the conviction. Those persons who favor limiting the retroactive reach of the case might also acknowledge that the *Gideon* rule should be followed in any postconviction proceeding involving any person tried after the date of Gideon's trial in the Florida State Court in 1961.[35] In other words, persons who feel that the decision should not be given unlimited retroactive effect are not forced to the extreme of saying that it should be given no retroactive effect; they can argue that in *Gideon* the Supreme Court invalidated a 1961 conviction, and that the decision should be regarded as creating a new rule from that date forward, but not earlier.

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31 See Griffin v. Illinois, 351 U.S. 12, 25-26 (1956) (Frankfurter, J. concurring); Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932). Contrast the views expressed by Justice Goldberg in Norvell v. Illinois, 373 U.S. 420, 424 (1963) (dissenting opinion), and by Judge Sobeloff in Jones v. Cunningham, 319 F.2d 1, 4 (4th Cir. 1963) (concurring opinion). See Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650 (1962).

32 See Robinson v. Johnston, 50 F.Supp. 774 (N.D. Cal. 1943).

33 351 U.S. 12 (1956).

34 Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958).

35 Cf. Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650 (1962).

My own view is that the decision should be given full retroactive effect. The Supreme Court has said that it is unconstitutional for a state to convict a person of a serious offense without a lawyer. To refuse complete retroactive effect would mean that persons would be held in prison pursuant to a procedure which a unanimous Supreme Court has said violates the Constitution. Consider the profound sense of injustice which would be generated by refusal to give retroactive recognition to the decision! It is important not only that justice be done, but that it appears to be done.

This conclusion is buttressed by Justice Black's opinion for the Court in *Gideon*. "The fact is," he wrote, "the Court in *Betts v. Brady* made an abrupt break with its own well considered precedents." He felt that, in *Gideon,* the Court was "returning to . . . old precedents" and "restor[ing] constitutional principles established to achieve a fair system of justice."[36] That is to say, Justice Black rejects the notion that *Gideon* is an adaptation to changed circumstances — a common premise among persons who advocate giving a decision only prospective effect or limiting its retroactive scope.

I am informed that fears by state authorities that retroactive application would result in a general jail delivery have proved in practice to be fanciful. Various prisoners seeking review of their convictions have been cautioned that, upon retrial, a more severe sentence than was originally imposed could possibly be meted out.[37] In these circumstances, defense counsel have negotiated reductions in long-term sentences, but I understand that as of December 1963, relatively few prisoners had been released or retried.

It is, of course, possible that some prisoners will insist upon their right to a new trial, and that it may be impossible for the prosecution, in view of the passage of time, to prove a long past offense. Such prisoners will probably have already served a substantial part of a long sentence. The possibility that some prisoners may go free may be the price which must be paid for withholding a fundamental right.

Second, I do not think that the *Gideon* decision can justifiably be restricted to situations where the accused specifically requests that a lawyer be appointed to help him — as Clarence Earl Gideon did. The Supreme Court did not attach any significance whatever to that point. The trial judge has an affirmative duty to satisfy himself by a meticulous and thorough examination that the accused has not ignorantly or incompetently waived his right to counsel.[38]

Third, I believe it immaterial that Gideon pleaded innocence. The underlying logic of the case — the idea that a person cannot be judged fairly unless he has an attorney — applies with equal force to a situation where the accused elects to plead guilty. Such a defendant requires the guidance of counsel in

36 372 U.S. at 344.

37 See Robinson v. Johnston, 50 F.Supp. 774 (N.D. Cal. 1943); Robinson v. United States, 324 U.S. 282 (1945) (defendant sentenced to life imprisonment successfully attacked conviction for failure to appoint counsel; following retrial he was sentenced to death for the same offense. The sentence was subsequently commuted. See HALL & GLUECK, CASES ON CRIMINAL LAW AND ITS ENFORCEMENT 604 (1958).

38 Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948).

appreciating the implications of the plea and in connection with sentencing.[39]

Fourth, the principal questions which remain unresolved are whether counsel must be furnished in *all* criminal cases, including prosecutions for misdemeanors and petty offenses, and the point in time during criminal proceedings when counsel must be furnished.

It has been urged that the scope of the right to counsel in state courts under the Fourteenth Amendment should be the same as in the federal courts under the Sixth Amendment.[40] The Sixth Amendment guarantees the assistance of counsel "in all criminal prosecutions."[41] The Supreme Court, however, has never decided whether the right extends under this amendment in federal prosecutions to misdemeanors and petty offenses, but a lower federal court has held that misdemeanors are covered.[42] The Criminal Justice Act of 1963 — a bill proposed by the Department of Justice in order to implement the right to counsel in federal courts — explicitly provides for assignment of counsel in misdemeanor cases, but excludes petty offenses.[43]

An argument rooted in history has been made to support the conclusion that the line where counsel must be furnished should be drawn at petty offenses. The argument is based upon the Supreme Court's interpretation of the Sixth Amendment's guarantee that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . ." The Court has held that the right to jury trial secured by this provision does not extend to crimes classified as "petty offenses" under the English common law in 1787.[44] By parity of logic, it is said, the right to counsel in federal courts would not extend to petty offenses, and it should not be obligatory upon the states to do so under the Fourteenth Amendment.[45]

I believe that a man is entitled to the assistance of counsel in any case where he may be punished by the state — in short, in all cases where he may be deprived of life, or liberty, or property by criminal processes. It is true that the *Gideon* case involved an offense which was characterized as a felony under Florida law — Gideon was sentenced to five years' imprisonment. However, in my view, the argument that the duty to furnish counsel is limited to felony prosecutions is doomed to failure. Before *Gideon,* a distinction had been recognized between capital and noncapital offenses — there was an absolute duty to furnish counsel in a case where a death sentence could be imposed, but in all other cases the state's duty depended upon special circumstances. This distinction has been buried by the *Gideon* decision. The case supports the proposi-

39 See Ass'n of the Bar of the City of New York, Special Committee to Study Defender Systems, Equal Justice for the Accused 35-36 (1959).

40 This view was urged in effect by Justice Douglas, concurring in Gideon v. Wainwright. Justice Harlan, however, in a concurring opinion, reiterated his view that there may be a disparity between the constitutional obligations imposed upon the states by the Fourteenth Amendment and the duty of the federal government under the Sixth Amendment.

41 The right of indigent defendants to assistance of counsel in federal criminal prosecutions was established in Johnson v. Zerbst, 304 U.S. 458 (1938).

42 Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942).

43 See Hearings on Criminal Justice Act of 1963 Before the Senate Committee on the Judiciary, 88th Cong., 1st Sess. 4 (1963).

44 District of Columbia v. Clawans, 300 U.S. 617 (1937); see Frankfurter & Corcoran, *Petty Federal Offenses and The Constitutional Guaranty of Trial by Jury,* 39 HARV. L. REV. 917 (1926).

45 See Kamisar, *Where to Draw the Line?* 22 LEGAL AID BRIEF CASE 10 (1963).

tion that the test of the right to counsel is not the severity of the penalty but the *need* for legal assistance. A man charged with an offense classified as a misdemeanor or a petty offense, who can be imprisoned for six months, may need the help of a lawyer very badly, indeed.

I do not believe the Supreme Court is insensitive to the point that providing counsel to all indigents charged with misdemeanors or petty offenses presents difficult practical problems. Good faith compliance with the *Gideon* decision, however, requires that the states begin to consider and implement various solutions to this matter. In this connection, it is important to point out that the Supreme Court has not directed the states to adopt any specific system for providing counsel. A particular locality is free to adopt any plan for the appointment of counsel which is consonant with the community's needs, preferences, and resources, subject only to the requirement that the system adopted guarantee effective legal aid.

The question of timing in connection with the appointment of counsel is, of course, critical. It has frequently been remarked that the failure to provide counsel at the preliminary stages of a prosecution is one of the most serious deficiencies of present practice. *Gideon* involved the right to counsel at the trial stage. In another case decided last term, the Supreme Court held that the absence of counsel at a preliminary hearing voided the conviction of an accused person who pleaded guilty at that time.[46] The test which has been evolved by the Court is whether the stage of the prosecution at which the accused is not represented is "critical."[47]

I believe that the right to an attorney should attach at the time of arrest. That is the moment when the state assumes an adversary role. It is also the time when an accused may be most in need of legal assistance.[48] Some of the most troublesome problems connected with the administration of criminal justice would be substantially ameliorated if the right to counsel were held applicable as of the moment of arrest. I need mention only the issue of coerced confessions and the right to bail as examples.

There are, of course, very real practical problems in guaranteeing counsel prior to the preliminary hearing. In large, urban centers, this problem might be solved by a readily available public defender. But I can offer no ready solution to this dilemma.

All of the questions discussed above existed in the great majority of the states before *Gideon* was decided. Any state which required the appointment of counsel had to determine whether the right applied to all cases or only to felonies, when the right attached, whether it applied in cases where the accused pleaded guilty, and so on. The *Gideon* decision provides a constitutional spur to resolution of these problems by all of the states.

46 White v. Maryland, 373 U.S. 59 (1963).
47 Hamilton v. Alabama, 368 U.S. 52, 53 (1961).
48 See Ass'n of the Bar of the City of New York, *op. cit.* note 39 *supra* at p. 60.

III

Finally, a word should be said about the broader constitutional implications of *Gideon*. Specifically, the case has important ramifications in connection with the historic controversy concerning the applicability of the Bill of Rights to the states. Further, I believe it represents a development of importance in the attitude of the Supreme Court toward civil rights.

The *Gideon* case represents a notable victory for those who argue that the rights enumerated in the Bill of Rights are applicable to the states under the Fourteenth Amendment. The Court has adhered to the position that the Fourteenth Amendment does not incorporate or absorb all of the Bill of Rights.[49] In speaking for the Court in *Gideon*, Justice Black — a leading advocate of the "incorporation" or "absorption" theory — did not say that the due process clause of the Fourteenth Amendment incorporates the Sixth Amendment. Instead, Justice Black looked, consistently with orthodox theory, to the Sixth Amendment, as a source or standard for determining whether a right was "fundamental" to a fair trial and thus obligatory upon the states. Whatever the dialectic, the fact remains that year by year, the list of rights enumerated in the Bill of Rights deemed "fundamental" and therefore enforceable against the states has grown. Two years ago, the Court said that the Fourth Amendment's prohibition against unreasonable searches and seizures applied to the states pursuant to the Fourteenth Amendment.[50] A year ago, the Court ruled that the Eighth Amendment's ban on cruel and unusual punishment was covered by the Fourteenth Amendment.[51] And now the right to counsel — which the federal government must provide under the Sixth Amendment — is applicable to the states. Recently, the Court agreed to review a case in which reconsideration is asked of the holding in *Twining v. New Jersey*[52] that the Fifth Amendment's ban on self-incrimination does not apply to the states.[53] The Court is approaching the point where most of the guarantees of the Bill of Rights will be held binding upon the states under the Fourteenth Amendment.

I suggest further that the *Gideon* case represents an important state in the evolution of the Court's attitude towards individual rights. The traditional idea has been that the Bill of Rights and the Fourteenth Amendment are limitations upon governmental action with respect to an individual. Government cannot abridge freedom of speech or freedom of religion; the police cannot make unreasonable searches and seizures; property cannot be taken without just compensation; and so on. In other words, the constitutional provisions involved have been viewed as preventing the government from taking away liberties, as negative restraints on governmental actions.

In the *Gideon* case, however, the Court has held that the state has an affirmative obligation to give or to do something in behalf of the indigent and disadvantaged defendant. In this sense, the *Gideon* case is intimately related to

49 Adamson v. California, 332 U.S. 46 (1947). See Henkin, *'Selective Incorporation' In the Fourteenth Amendment*, 73 YALE L. J. 74 (1963).
50 Mapp v. Ohio, 367 U.S. 643 (1961).
51 Robinson v. California, 370 U.S. 660 (1962).
52 211 U.S. 78 (1908).
53 Malloy v. Hogan, 83 Sup. Ct. 1680 (1963).

the decision of the Court in 1956 in *Griffin v. Illinois*,[54] where the Court said that indigent defendants must be afforded a transcript of record adequate for appellate review.[55] This idea — the notion that the state must positively assist disadvantaged persons — has become accepted in economic matters. It is an idea which is slowly emerging in the field of civil liberties, particularly in criminal proceedings. It is given momentum by the ruling in *Gideon v. Wainwright*.

A Supreme Court decision may be great — to quote Professor Allen of the University of Chicago — "because it appears to capture the essence of an era, because it epitomizes the tensions and social pathology of the period and, at the same time, casts revealing light on its ideals and aspirations."[56] *Gideon* is a great case because, in the straightforward prose of Justice Black, the Supreme Court has given significant expression to two of this country's deepest ideals and aspirations — a fair trial and just treatment of the poor and disadvantaged.

54 351 U.S. 12 (1956).
55 See also Draper v. Washington, 372 U.S. 487 (1963); Hardy v. United States, 32 U.S.L. WEEK 4084 (S. Ct., Jan. 6, 1964).
56 Allen, *The Supreme Court and State Criminal Justice*, 4 WAYNE L. REV. 191 (1958).